MATSUMOTO & CO SDN BHD

v.

PIHAK BERKUASA KEMAJUAN PEKEBUN KECIL PERUSAHAAN GETAH (RISDA)

COURT OF APPEAL, KUALA LUMPUR
ALAUDDIN MOHD SHERIFF JCA
NIK HASHIM JCA
ABDUL WAHAB PATAIL J
[CIVIL APPEAL NO: W-02-711-2001]
31 JANUARY 2004

CONTRACT: *Agreement for supply and delivery of goods - Formation of contract - Agreement by buyer to purchase certain amount of goods from vendor - Whether only a standing offer by vendor to supply goods - Whether buyer must purchase exact amount of goods as stated in agreement - Whether buyer can refuse to make any purchase - Whether buyer can issue variation order to decrease amount to be purchased - Whether variation order amounted to breach of contract - When does contract become complete and binding*

SALE OF GOODS: *Construction of contract - Agreement for supply and delivery of goods - Agreement by buyer to purchase certain amount of goods from vendor - Whether only a standing offer by vendor to supply goods - Whether buyer must purchase exact amount of goods as stated in agreement - Whether buyer can refuse to make any purchase - Whether buyer can issue variation order to decrease amount to be purchased - Whether variation order amounted to breach of contract*

SALE OF GOODS: *Quantity of goods - Agreement for supply and delivery of goods - Agreement by buyer to purchase certain amount of goods from vendor - Whether only a standing offer by vendor to supply goods - Whether buyer must purchase exact amount of goods as stated in agreement - Whether buyer can issue variation order to decrease amount to be purchased - Whether variation order amounted to breach of contract*

This was an appeal by the plaintiff from the decision of the High Court dismissing its claim against the defendant for loss of profits amounting to RM485,108.50 or, alternatively, for damages for breach of contract. It was the plaintiff's claim that the defendant had breached its contractual agreement to purchase a certain amount of fertilisers from the plaintiff. The High Court, however, found for the defendant and held that it was entitled to issue a variation order and decrease its requisition for the fertilisers.

Held (dismissing the appeal)
Per Nik Hashim JCA delivering the judgment of the court

[1a] The agreement between the parties was merely a standing offer for the supply and delivery of goods, ie, fertilisers. Unless and until an order has been made by the defendant, there would be no obligation on the part of the plaintiff to supply and deliver the fertilisers. It was only after the plaintiff has accepted an order for fertilisers from the defendant that a binding contract could come into existence. (p 839 d-f)

[1b] The agreement between the parties did not in any way compel the defendant to order the various quantities of fertilisers as stated in the agreement itself. The agreement contemplated a situation wherein the defendant could order the fertilisers from the plaintiff on an 'as and when' required basis. (pp 840 h & 841 a)

[2] The terms of the agreement also allowed the defendant to unilaterally increase or decrease the amount of fertilisers that it could order from the plaintiff by way of variation orders. This was an absolute entitlement under the terms of the agreement. Hence, the issuance of the variation order herein by the defendant did not at all amount to a breach of contract. (pp 841 b-d & 842 a)

[Decision and orders of High Court affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini merupakan satu rayuan dari plaintif dari keputusan Mahkamah Tinggi yang menolak tuntutannya terhadap defendan untuk kehilangan keuntungan yang berjumlah RM485,108.50 atau secara alternatif, untuk gantirugi bagi kemungkiran kontrak. Plaintif mendakwa bahawa defendan telah memungkiri kontrak perjanjian untuk membeli sejumlah baja dari plaintif. Namun begitu, Mahkamah Tinggi memihak kepada defendan dan memutuskan bahawa defendan berhak mengeluarkan satu ubahan pesanan dan mengurangkan keperluan bajanya.

Diputuskan (menolak rayuan) :
Oleh Nik Hashim HMR memyampaikan penghakiman mahkamah

[1a] Perjanjian di antara kedua pihak hanyalah merupakan satu tawaran terbuka untuk bekalan dan penghantaran barangan iaitu baja. Kecuali hanya dan sehingga satu pesanan telah dibuat oleh defendan, tidak terdapat obligasi pada pihak plaintif untuk membekal dan menghantar baja. Ianya hanya selepas plaintif menerima satu pesanan untuk baja dari defendan, maka satu kontrak yang mengikat wujud.

[1b] Perjanjian di antara pihak-pihak tidak sesekali memaksa defendan untuk memesan berbagai jumlah baja sebagaimana yang dinyatakan di dalam perjanjian tersebut. Perjanjian tersebut hanya memberi situasi di mana defendan dapat memesan baja dari plaintif secara dasar pada dan apabila diperlukan.

[2] Terma-terma perjanjian tersebut juga membenarkan defendan secara sendiri menambah atau mengurangkan jumlah baja yang boleh dipesannya dari plaintif secara ubahan pesanan. Ini merupakan satu hak mutlak di bawah terma-terma perjanjian tersebut. Oleh yang demikian, pengeluaran ubahan pesanan yang dibuat oleh defendan ini tidak sesekali menjadi satu kemungkiran perjanjian.

Keputusan dan arahan-arahan Mahkamah Tinggi disahkan.]

Case(s) referred to:
Chand Kunwar v. State AIR [1981] Rajasthan 23 ***(foll)***
V Kanagasabai v. The State of Selangor [1935] MLJ 57 ***(foll)***
Winch v. Winchester [1812] 1 Ves & B 375 ***(refd)***

Other source(s) referred to:
Hudson's Building and Engineering Contracts, 11th edn, vol 1, p 880 (c)

For the appellant - Shamsul-Bahrain Ibrahim; M/s Skrine & Co
For the respondent - K Thavanesan (Raja Nazrin Raja Ghazila & S Shermala); M/s Ariffin Raj De Silva

Reported by Gan Peng Chiang

JUDGMENT

Nik Hashim JCA:

Factual Background

This appeal is directed against the decision of the High Court at Kuala Lumpur delivered on 1 August 2001 in an action brought by the appellant before us as plaintiff against the respondent RISDA as defendant. At the conclusion of submissions before us on 13 January 2004, we dismissed the appeal. The reasons for our decision now follow.

The appellant's claim against RISDA is for loss of profit of RM485,108.50 or alternatively, damages for breach of five contracts for the supply of fertilizers by the appellant to RISDA on the ground that RISDA purchased less than the quantity agreed under each of the contracts.

The contract was entered into on 1 October 1990. It was for the supply of 43,254 metric tons of fertilizers called Granular Blend for the period of 1 October 1990 to 30 September 1992 at RM435.18 per ton, the total price being RM18,823,275.72.

The recital in the Form of Agreement declares "WHEREAS the Authority (RISDA) is desirous of certain goods to be supplied and delivered ... and has accepted a Tender/Offer by the Supplier (appellant) for the supply and delivery of the said goods". Clause 3 states:

> In consideration of the payments to be made by the Authority (RISDA) to the Supplier (appellant) as herein mentioned the Supplier (appellant) covenants with the Authority (RISDA) to supply and deliver the goods in conformity in all respects with the provisions of this contract.

Clause 4 reads:

> The Authority (RISDA) hereby covenants to pay the Supplier (appellant) in consideration of the supply and delivery of the goods ...

Clause 5(a) of the General Conditions of Contract envisages that the supply was to be made when orders were issued by RISDA. It states:

> All orders for the goods to be supplied and delivered under this contract shall be issued from time to time in writing or by telephone ...

On 6 January 1992 RISDA, by a variation order under cl. 10 of the General Conditions of Contract decreased the order from 43,254 metric tons to only 23,000 metric tons representing 53.17% of the total purchases for an extended period ending sometime in October 1992. RISDA, however, actually received 29,245.50 metric tons, which have been paid for.

The said cl. 10 states:

> Any statements given in the Contract as to the total quantities of any goods likely to be required during the period of the Contract shall be deemed to be estimates only and all purchases thereof shall be more or less of that quantity at the agreed price and the Authority (RISDA) shall be under no obligation to purchase such quantities. Any increase or decrease in quantities from that provided in the Contract shall be by way of a Variation Order.

In the court below, the parties had agreed that the only issue to be determined was whether in the circumstances of the contract, RISDA was entitled to issue the variation order. In his reserved judgment, the learned judge ruled that RISDA was entitled to issue the variation order and hence he dismissed the appellant's action with costs. This is the appellant's appeal against that decision.

Contentions

Before us learned counsel for the appellant argued that RISDA was not entitled to issue the variation order as it was issued prematurely, unilaterally and arbitrarily. The phrase "more or less" connotes that the variation order was issuable only to vary the quantities within the region of 5% of the total quantities and as such, the respondent's resort to cl. 10 was a breach having the effect of terminating the contract.

Learned counsel for RISDA, on the other hand, submitted that RISDA was at liberty to purchase more or less than the quantities mentioned in the contracts as the quantities are merely estimates, and by virtue of cl. 10 of the contract, RISDA was under no obligation to purchase the amount of fertilizers as mentioned in the contract or any amount at all.

Decision

There is much merit in the respondent's submission. The contract between the parties entered on 1 October 1990 was merely a standing offer for the supply and delivery of the goods, namely fertilizers, as were mentioned in the contract, and until and unless an order has been made by RISDA there is no obligation on the part of the appellant to supply and deliver the fertilizers. This is obvious from the recital and cls. 3 and 4 in the Form of Agreement and cl. 5 (a) of the General Conditions of Contract. The recital declares that RISDA was desirous to have the goods to be supplied and delivered and had accepted a "Tender/Offer" by the appellant for the "supply and delivery of the goods". By cl. 3 the appellant, in consideration of payments to be made by RISDA, covenanted to "supply and deliver" the goods. By cl. 4 RISDA, in consideration of the "supply and delivery" of the goods, covenanted to pay the appellant. Clause 5(a) envisages that the supply was to be made when orders were issued by RISDA. It states:

> All orders for the goods to be supplied and delivered under this contract shall be issued from time to time in writing or by telephone by the Authority (RISDA).

In *Chand Kunwar v. State*, AIR [1981] Rajasthan 23, the Jail authority invited tenders for the supply of ration commodities to the Jail. Under the contract, the supplier was required to deliver goods within a week on submission of indent by the authority. The contract contained a default clause under which the supplier was made liable for loss incurred by the authority in the event of his failure to deliver goods ordered for. The supplier delivered goods regularly for some time as per indents but subsequently communicated his inability to supply goods. The Jail authority purchased goods from the market and sued the supplier for loss sustained on ground of breach of contract. It was held

that the contract was merely a continuing offer and no binding contract came into existence. It was merely a standing offer and it was only after the orders were placed for specific quantity that the supplier was bound to supply the contractual commodities to the authority and that after the acceptance of the order a completed binding contract could have come into existence. Consequently the authority was not entitled to recover loss on account of the alleged breach of contract.

In the local case of *V. Kanagasabai v. The State of Selangor* [1935] MLJ 57, the Public Works Department (PWD) of the state of Selangor invited tenders for cartage and general transport. The plaintiff-appellant's tender was accepted and he entered into a contract. During the first seven months of the year covered by this contract indents were issued by the PWD to the plaintiff-appellant and executed by him to the value of RM5,414.47, but during the remaining five months, all cartage work, for financial reasons, was carried out by the PWD themselves, except for a small amount of work costing RM123.83 for which other contractors were employed. The plaintiff-appellant instituted a suit claiming a sum of RM19,121.53 which represents the difference between the amount which he was paid in respect of the indents issued to him and the maximum amount of RM24,536, mentioned in the contract or, alternatively, a claim to be paid for such cartage work as had been diverted from him and executed by the PWD or other contractors. It was held that there was no obligation on the defendant-respondent, either from the terms of the contract itself or from surrounding circumstances, to provide the plaintiff-appellant with work to the value of RM24,536 or any work.

Huggard, CJ at p. 59 of the case said:

> But in my view those recitals ("the Government are desirous of arranging for the supply of such number of bullocks, carts, drivers and coolies, as may be required for the service of the PWD ..." and that "the Contractor is prepared to supply such bullocks, and carts, drivers and coolies ...") when read in conjunction with the rest of the Contract, mean no more than that an arrangement has been arrived at between the parties for the supply by the appellant of bullocks, carts, drivers and coolies as and when required by the respondents.

We agree with the respondent that the contract contemplates a situation where RISDA contracts with the appellant that during the contract period if there is a need for fertilizers, it will order from the appellant. The contract does not in any way compel RISDA to order the quantities so stated in the contract. Clause 10 is clearly unambiguous in its terms in that the quantities so mentioned are only estimates. It is impossible to fix the limits of the variation that would

be covered by the words "more or less". The phrase "more or less" is defined in the *Concise Oxford Dictionary*, 9th edn to mean "as an estimate". Thus by the definition, the variation cannot be limited to only about 5% as suggested by the appellant as the quantities that were required by RISDA were only estimates and therefore uncertain, throwing upon RISDA to determine the necessity with regard to them (see *Winch v. Winchester* [1812] 1 Ves & B 375).

Clause 10 also contains a proviso which qualifies the quantities in that it is expressly clear that RISDA is under no obligation to purchase such quantities as were mentioned in the contract and further in the event RISDA wishes to decrease the amount of quantities, RISDA is at liberty to do so by way of a variation order. By inserting cl. 10 into the contract, the appellant had agreed to allow RISDA to unilaterally increase or decrease the quantities in the contract by way of variation orders and no circumstances are stipulated for entitling RISDA to increase or decrease the quantities. The right to issue a variation order under cl. 10 is absolute and does not depend on any ground nor does RISDA have to assign any reason. RISDA is entitled to issue a variation order unilaterally and as of right.

Hudson's Building and Engineering Contracts, 11th edn, vol. 1 at p. 880 (c) under the heading: 'Reasons for variation clauses' states:

> These are inserted into nearly all construction contracts at the present day for two principal reasons. In the first place, they give the owner the power to require a variation of the work, **unilaterally and as of right**, as opposed to relying on the willingness of the contractor to agree to the variation, which otherwise enable the contractor to exert unacceptable pricing or other pressures on the owner in return for his agreement to carry out the variation. (emphasis added)

Although the above passage relates to a building contract the meaning and effect of such a clause is also applicable in any contract in that such a clause:

(i) allows for a variation of the obligation under the contract without the change in the terms of the contract, and

(ii) allows a party unilaterally and as of right, as opposed to relying on the agreement of the other party, to make a variation.

Therefore, since the appellant had already consented to the variation in the quantities ordered, the appellant cannot now complain against the stance taken by RISDA nor vary or contradict the plain and obvious meaning of clause 10 of the contract. Thus, the issuance of the variation order cannot be construed "as a breach of contract having the effect of terminating the contract" as was alleged by the appellant.

It is our view that cl. 10 empowers RISDA to order the variation of the quantities they so require, which was done in this case by the variation order dated the 6 January 1992 and in doing so RISDA was under no obligation to justify the issue of such order. Even if RISDA had to justify for the variation order the same had been done through the testimony of RISDA's senior manager DW1. His evidence was not even challenged or contradicted by the appellant. DW1 had stated that in placing the amount of quantities required, RISDA had made only an estimate and that this amount was varied because of:

(i) the reduction of the replanting schemes

(ii) the reduction of government subsidy, and

(iii) the rejection by the smallholders to the fertilizers of the appellant.

This is what DW1 said in his testimony at p. 62 of the record of appeal:

> RISDA tidak terikat dengan kuantiti yang dipersetujui.
>
> Variation order was issued (p 46 ikatan dokumen defendan [IDD]). Saya yang keluarkan. Sebabnya kerana setelah setahun berjalan, didapati amaun yang diperlukan berkurangan daripada amaun yang dianggarkan. Dinyatakan dalam perenggan pertama variation order ...
>
> Salah satu sebabnya ialah pengurangan peruntukan untuk tanam semula bagi 1991 dan 1992. Seterusnya pengurangan daripada subsidi kerajaan. Satu lagi sebab ialah pekebun kecil tidak suka baja RCGB. Daripada laporan yang diterima, mereka tak puas hati dengan mutu baja yang dibekalkan. Ada yang kata bajanya beku. Ada yang kata berair. Ada yang kata mengandungi pasir dan batu.

Further at p. 63 he said:

> Setelah variation order, kita telah bermesyuarat dengan plaintiff (appellant) beberapa kali dan memberi signal kepada plaintif tentang kemungkinan kekurangan keperluan kerana, sejak awal 1991 lagi, RISDA telah dapat tahu bahawa peruntukan bantuan tanam semula dan subsidi telah dikurangkan.

Under cross-examination, DW1 at p. 66 said:

> Mengikut amalan, perubahan kuantiti dibuat berdasarkan kepada permintaan dari pekebun-pekebun kecil yang bergantung juga kepada bantuan tanam semula dari kerajaan dan berdasarkan kepada bantuan subsidi dari kerajaan.
>
> Dalam kes ini, faktornya ialah peruntukan yang berkurangan terhadap tanam semula oleh kerajaan bagi tahun 1991 dan 1992. Kedua, peruntukan yang berkurangan di atas subsidi baja oleh kerajaan bagi tahun-tahun itu. Ketiga, ketidakmahuan oleh pekebun kecil menerima baja RCGB 1 disebabkan kuantiti yang rendah.
>
> Keputusan invoke fasal 10 dibuat selepas berlakunya faktor-faktor tadi.

It is therefore clear from the above passages that RISDA had satisfied itself when giving the reasons for the invocation of cl. 10 for the variation in the quantities. In our judgment, the reasons given are more than adequate and justified under the circumstances.

In the event we agree with the learned judge that RISDA was entitled to issue the variation order. There was no basis for the appellant's complaints. The appeal was therefore dismissed. The judgment of the learned judge and the orders made by him were affirmed. We also ordered that the costs of the appeal be paid by the appellant to the respondent, and lastly ordered that the deposit paid into court by the appellant be paid out to the respondent to account of its taxed costs.